

“Waters of the United States” and the Clean Water Rule

February 9, 2017

Overview of Presentation

- **Waters of the US in context**

- CWA programs
- Section 404 program
- Longstanding regulations
- Legal challenges

- **The Clean Water Rule**

- Scientific basis
- Rulemaking process
- Content of CWR
- Litigation

“Waters of the US” and the Clean Water Act



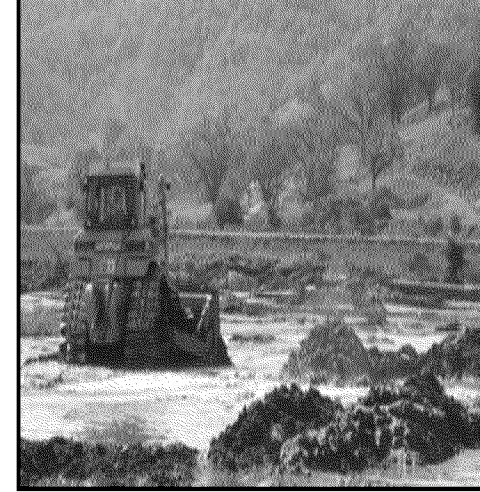
- “Waters of the US” (WOTUS) is a threshold term under the Clean Water Act (CWA) for the scope of the Act
- CWA programs address “navigable waters,” defined in the statute as “waters of the United States including the territorial seas”
 - CWA did not define WOTUS; Congress left further clarification to agencies
- EPA and the Army Corps have defined WOTUS by regulation since the 1970s. The regulatory definition in place before the CWR dates to the mid 1980s and is substantially the same as the 1970s definition
- Two U.S. Supreme Court decisions since that 1980s regulatory definition did not invalidate the definition, but shaped its implementation across all CWA programs

“Waters of the US” and the Clean Water Act, continued



- CWA establishes many programs to protect quality of WOTUS:
 - Section 303(c): state-developed water quality standards setting waters' quality goals
 - Section 303(d): “Total Maximum Daily Load” (TMDL) plans to bring waters into compliance with water quality standards
 - Section 311: oil spill prevention and clean-up
 - Section 401: state/tribal certification that federal permits and licenses are consistent with CWA and local requirements
 - Section 402: “NPDES” permit program for “end of pipe” discharges of pollutants from sources including factories, sewage treatment plants, and other point sources
 - Section 404: permit program for discharges of dredged/fill material

Waters of the US and Section 404



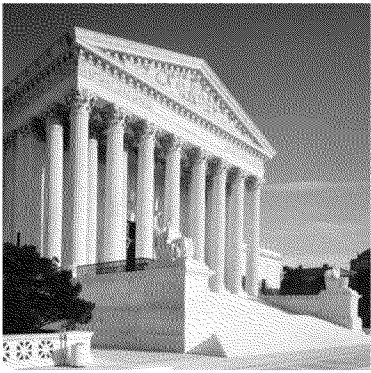
- Same definition of WOTUS applies to section 404 as other CWA programs
- Since 1972 the Army Corps and EPA have jointly implemented the program to significantly reduce the ongoing loss of wetlands and streams, while authorizing tens of thousands of dredged/fill activities annually
 - Congress tasked the Army Corps with operating the 404 permit program and EPA with developing the environmental review criteria under which permits would be evaluated
 - EPA and the Army Corps have jointly developed the definition of WOTUS, while EPA has the final policy responsibility for its scope

Waters of the US and Section 404, continued

- The Army Corps makes the vast majority of jurisdictional determinations (JDs)
 - This is in part why WOTUS issues so often arise in the section 404 context
 - However, court decisions about the scope of WOTUS also have involved the section 402 NPDES and section 311 oil spill clean-up programs
- Even if dredge/fill discharges are into a WOTUS, a 404 permit might not be required if activity is exempt under 404(f)
 - For example, discharges associated with ongoing farming activities such as plowing, seeding, and cultivation typically do not need a 404 permit

Waters of the US and its Longstanding Regulatory Definition (dates to mid-1980s)

- This is the **definition in use today** during ongoing litigation over the Clean Water Rule
- **Definition includes:**
 - Waters used/historically used/susceptible to use in interstate commerce
 - Interstate waters and wetlands
 - All other waters ... the use, degradation, or destruction of which could affect interstate commerce
 - Impoundments of WOTUS
 - Tributaries of above waters
 - Territorial seas
 - Wetlands adjacent to above waters
 - Excludes: prior converted cropland, waste treatment systems



Waters of the US at the Supreme Court

- ***Riverside Bayview*** (1985): Wetlands adjacent to TNWs are properly part of WOTUS
- ***SWANCC*** (2001): Presence of migratory birds by itself not enough to make “other waters” WOTUS
- ***Rapanos*** (2006): Tributaries, adjacent wetlands. Split decision on what WOTUS includes
 - Scalia: “Relatively permanent” or at least seasonal waters; wetlands with a “continuous surface connection”
 - Kennedy: Waters with a “significant nexus” affecting physical, chemical, or biological integrity of downstream waters
 - All: WOTUS includes more than just waters that are navigable

Waters of the US and Legal Challenges Posed By *Rapanos*

- *Rapanos* has now been interpreted, applied, discussed, or cited in > 130 federal judicial opinions
 - These cases arise in more than 2/3 of all U.S. states
 - U.S. position: water is jurisdictional if meets either the Kennedy or Scalia standards
- All but one U.S. Circuit Courts of Appeal have agreed with U.S. regarding what standard applies
 - Most hold either Kennedy or Scalia standard can be used
 - One held Kennedy standard only
 - None say Scalia standard only
- Supreme Court has rejected all petitions for review



Why Did the Agencies Develop the Clean Water Rule (CWR)?

- The Supreme Court did not invalidate the 1980s definition of WOTUS, but discussed its limitations and implications
- Many were confused how to implement the unchanged definition in light of the Supreme Court decisions. Where was a permit required? Will a case-by-case determination cause delays?
- For more than a decade, EPA and the Army Corps received requests for rulemaking to provide clarity
 - Bipartisan Members of Congress, Supreme Court Justices, state and local officials, industry, agriculture, environmental and conservation groups, scientists, builders and developers, and the public

Why Did the Agencies Develop the CWR?

Continued

- The agencies wished to clarify the scope of federal protection for streams and wetlands that form the foundation of our nation's water resources
 - **People depend on clean water for their health:** About 117 million Americans get at least some of their drinking water from streams that lacked clear protections after *Rapanos*
 - **Our economy depends on clean water:** manufacturing, farming, tourism, recreation, energy production and other major economic sectors need clean water to function and flourish
 - **Recreation and wildlife depend on clean water:** healthy ecosystems provide wildlife habitat and places to fish, hunt, paddle, and swim

CWR: Scientific Support

- The agencies' interpretation of the CWA's scope in the rule is guided by the **best available peer-reviewed science**— particularly as that science informs the determinations as to which waters have a “significant nexus” with traditional navigable waters (TNWs), interstate waters, or the territorial seas
 - Includes the Science Report summarizing **more than 1,200** peer-reviewed, published scientific studies which showed that small streams and wetlands cumulatively play an important role in the health of larger downstream waterways like rivers and lakes
- The **Technical Support Document** utilizes the Science Report and the articles it cites, as well as additional scientific literature to provide the scientific support for the rule
- The **Science Advisory Board** commented on both the Science Report and the proposed rule, concluding that the waters included in the proposed rule were supported by available science and that the agencies could have protected yet more waters

Scientific Support - SAB Conclusions on Proposed CWR

- SAB states that science **supports the conclusion** that the types of water bodies identified as “waters of the United States” in the proposed rule exert strong influence on the chemical, physical, and biological integrity of downstream waters
- Though SAB was supportive of much of the proposed rule, some of their comments **suggested that the proposal could go further** in terms of waters that could be considered tributaries and went too far regarding exclusions
 - Advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks
 - Exclusions of groundwater and certain other exclusions listed in the proposed rule and the current regulation do not have scientific justification
 - There is a lack of scientific knowledge to determine whether ditches should be categorically excluded

CWR: Process

- Agencies held two in-person meetings with **small entity** representatives to discuss their thoughts on how to define WOTUS. Their input is reflected in the CWR and summarized in a report
- Agencies consulted with **state, tribal, and local officials** throughout the process. The CWR reflects their input, which also is summarized in a report
- For example, held in-person meetings and teleconferences with organizations of elected state/tribal/local officials, following up with numerous additional calls and meetings
- Held a series of meetings with the Local Government Advisory Committee

CWR: Process, continued

- Proposed rule subject to public comment May 2014
 - Received 1.1 million comments, about 20,000 unique, in a 207-day comment period
 - Over 400 stakeholder meetings
 - Interagency review
- Final rule signed May 2015, published June 2015, effective August 2015
 - Final ORD science synthesis provided much of the technical basis for the rule
- Sixth Circuit stayed the CWR nationwide pending outcome of litigation in October 2015
 - Agencies using the mid-1980s definition during the stay

CWR: Content

■ Bright line: Waters that are WOTUS

- Unchanged from 1980s rule: Traditional navigable waters, territorial seas, interstate waters, impoundments of WOTUS
- Tributaries, adjacent waters: in 1980s rule but with further definitions
 - Tributary: For first time, CWR defines “tributary” as a water with “bed and banks” and an “ordinary high water mark” that contributes flow, directly or through another water, to a traditional navigable water, interstate water, or territorial sea
 - Adjacent: Existing regulations define “adjacent” as “bordering, contiguous, or neighboring.” CWR defines and limits “neighboring” for the first time using floodplain and distance concepts. CWR applies adjacency to all waters, not just wetlands, thereby clarifying status of ponds and lakes adjacent to jurisdictional water
 - Agriculture: CWR adds for the first time that the agencies will not consider waters “adjacent” that are being used for normal farming, ranching, or forestry activities

■ Case-by-Case

- Specifically identified types of waters, waters within certain distances, and waters within a floodplain of certain jurisdictional waters, must be determined to have a significant nexus to be jurisdictional

CWR: Content, continued

- **Bright line: waters that are not WOTUS**
 - Retains existing exclusions for prior converted cropland, waste treatment systems
 - Adds new exclusions reflecting public input, such as stormwater management and water recycling systems built in uplands
 - Adds new exclusions for certain ditches
 - Ditches not constructed in streams and that flow only when it rains
 - Ditches not constructed in streams and that have intermittent flow, that do not drain wetlands
 - Ditches not connected to the tributary system
 - Adds new exclusions reflecting longstanding practice, such as irrigated areas that would revert to dry land if irrigation ceased, and farm ponds and other artificial lakes or ponds

Additional information on CWR in Appendix

CWR: No New Permit Requirements for Agriculture, while Preserving Existing Permit Exemptions

Normal farming, silviculture, and ranching practice

Upland soil & water conservation practice

Agricultural stormwater discharges

Return flows from irrigated agriculture

Construction/maintenance of farm or stock ponds or irrigation ditches on dry land

Maintenance of drainage ditches

Construction or maintenance of farm, forest, and temporary mining roads



CWR: Ongoing Litigation



- The CWR is being challenged in the Sixth Circuit Court of Appeals and in district courts
- Issue of “which court has jurisdiction” currently is before the U.S. Supreme Court
 - Briefing and further steps in the Sixth Circuit on the merits of the CWR are stayed pending the Supreme Court’s decision
 - Decision expected before July 2017
- The Sixth Circuit issued a temporary stay of the CWR in October 2015
 - As a result, agencies are implementing the mid-1980s regulatory definition as litigation proceeds

Questions and Discussion

